[APPELLATE CRIMINAL JURISDICTION]

HUGGARD, C.J. and GERAHTY, J.

March 29, 1934.

LEE MION *alias* LEE MIOW.....Appellant.

vs.

PUBLIC PROSECUTOR OF JOHORE, Respondent.

[JOHORE BAHRU CRIMINAL CASE No. 24 of 1933]
[JOHORE CRIMINAL APPEAL No. 5 of 1934]

Criminal law — sexual offences — unsworn evidence of child—corroboration.

Where an accused is convicted on the uncorroborated evidence of a child of tender age and there is nothing in the record of trial to indicate that the Magistrate or Judge has directed his mind to the danger of convicting on such evidence, it is the duty of an Appellate Court to set aside the conviction and not to assume that the Magistrate or Judge has properly directed himself.

Rex v. *Lim Yam Hong*, 14 S.S.L.R. 152, applied.

APPEAL from the conviction by Thorne, J., of the accused on a charge of rape.

The accused, who was on the 23rd day of January, 1934, convicted of rape of a girl of 11 years of age under section 376 of the Penal Code and sentenced to 4 years rigorous imprisonment, appealed to the Court of Appeal on the grounds, *inter alia*, that—

1. There was no material corroboration of the statement of the girl that the accused committed the offence.
2. The complaint, made to the mother of the girl shortly after the offence, was corroboration of the fact that the girl had been raped, but not necessarily corroboration of the fact that it was the accused who had committed the offence.

The appeal came on for hearing on the 19th March, 1934, before Huggard, C.J., and Gerahty, J.

M. V. Pillai for the Appellant.

Hamid bin Mustapha, Deputy Public Prosecutor, for the Respondent.

Cur. Ad. Vult.

HUGGARD, C. J.—The Accused was convicted by Thorne J. of the offence of rape on one Chin Ah Song, a girl of about eleven years of age, and has appealed against the conviction.

In support of the appeal it is contended that the conviction should be quashed on the ground that the unsworn evidence of the girl was not corroborated in any material particular implicating the Accused.

It is clear from the record that the case against the Accused rested entirely on the evidence of this little girl.

In England it is expressly provided by Statute that no person shall be convicted of an offence upon the unsworn evidence of a child of tender years unless that evidence is corroborated by some other material evidence in support thereof implicating the Accused. In this country we have no corresponding statutory provision, so that a conviction based on the unsworn evidence of a child of tender years is not necessarily illegal.

It appears to me, however, that in the absence from our law of any statutory provision corresponding to that in force in England, the acceptance of the unsworn evidence of a child should be subject to the same principles or rules of practice as apply to the acceptance of the evidence of accomplices.

What, then, are those principles or rules of practice?

Where the trial is held before a Judge sitting with a Jury or with Assessors I think it is the clear duty of the Judge carefully to direct the Jury or the Assessors as to the danger of convicting the Accused on the unsworn evidence of a child or on the evidence of accomplices, as the case may be, unless such evidence is corroborated in some material particular implicating the Accused. In the absence of such a direction an Appellate Court would, I think, have no alternative but to set aside the conviction. Where, however, the Jury or the Assessors have been properly cautioned by the Judge and have nevertheless convicted the Accused, an Appellate Court will not disturb the conviction merely on the ground of lack of corroboration.

Then we come to the case which is tried by a Judge sitting alone—that is, exercising the functions of both Judge and Jury—where, of course, there is no express direction. In considering such a case we have the guidance of the Judgments of the Court of Appeal of the Straits Settlements in *Rex* v. *Lim Yam Hong*, 14 S.S.L.R., 152. In that case the Accused had been convicted by the District Judge on the uncorroborated evidence of accomplices, he appealed against the conviction and the matter was referred to a full Bench. It was there laid down that if it appears that a Magistrate or District Judge has clearly present in his mind the danger of convicting on the unconfirmed evidence of an accomplice, but nevertheless believes that evidence and convicts, the Appellate Court will not interfere with the conviction merely on the ground of want of corroboration. I understand this to mean that it must appear from the record of the trial that the Magistrate or Judge has directed his mind to the danger of convicting on the uncorroborated evidence of an accomplice; if it does so appear from the record then the Appellate Court will not interfere merely on the ground of want of corroboration, but if it does not so appear then the Appellate Court will not assume that the Magistrate or Judge has properly directed himself and will set aside the conviction.

As I have already indicated I think that these principles are equally applicable to a case where the conviction depends solely on the unsworn evidence of a child of tender years, and

there seems to be no reason why they should not be applied to a case tried before a Judge of the Supreme Court.

Applying those principles to the present case which was tried before a Judge sitting alone, I can find nothing in the record of the trial to indicate that the learned Judge directed his mind to the danger of convicting on the uncorroborated evidence of this little girl, and in the absence of any such indication—following the decision in *Rex* v. *Lim Yam Hong*—I do not think we are entitled to assume that he did so.

In these circumstances I would allow this appeal and set aside the conviction.

GERAHTY, J.—The position in this country in regard to evidence given by children of tender age differs from that in England. There where the evidence of a child is given not on oath corroboration in material particulars implicating the accused is required by statute. See *In re Davies*, 85 L.J. K.B. 208.

Here there is no such legal requirement and an accused person may in law be convicted on such uncorroborated evidence.

In my opinion the practice prevailing in England in regard to the sworn but uncorroborated evidence of a prosecutrix in this class of case, and similarly of an accomplice, should be followed here.

At the trial in this case it is beyond dispute that the unsworn evidence of the complainant, aged 11 years, was not corroborated on any point tending to prove that the appellant had committed rape upon her. There was merely corroboration of the fact of rape.

Had the case been tried by a judge and jury the position would have been clear. The judge would have had to warn the jury that there was no corroboration of the complainant's story in the sense of evidence corroborating that story in a material particular implicating the accused. Further that in these circumstances it would be unsafe to convict. If the judge had failed to do this and the jury had convicted, this Court would have no alternative but to allow the appeal and quash the conviction. See the case of *Herbert William Parker*, 18 Cr. App. Reports, 103.

If the Judge had properly directed the jury as indicated above and the jury had nevertheless convicted, it might well be that this Court would not disturb the conviction. See *per* Hewart, L.C.J. in the same case at p. 104.

The difficulty here is that this case was tried by a judge sitting alone exercising the combined functions of judge and jury and further that the record before us is silent as to the grounds upon which the learned judge convicted the appellant.

I have to ask myself whether, in the absence of any indication anywhere in the record that the question of corroboration was duly considered, it would be correct for this Court to assume that the learned judge did in fact address his mind to the absence of corroboration and nevertheless considered it safe to convict the appellant?

With some reluctance, for I feel it is inconceivable that the learned trial judge did in fact make any such omission, I have come to the conclusion that an Appellate Court should not make an assumption on such a vital factor in the absence of any indication on the record.

I should possibly have considered it sufficient had it appeared in the notes of the addresses of counsel that the question of non-corroboration had been raised, but it does not so appear.

I say that this would probably be sufficient because, as the law stands in this State, it is not incumbent upon the trial judge to record his grounds of judgment in the event of an appeal as is the case with a Judge in the Federated Malay States and with a District Judge or Magistrate in the Colony.

Nevertheless I take the view that where an accused person is convicted by a judge sitting without a jury the record should disclose, either in the form of a special note made by the judge or in the notes of arguments submitted by Counsel, that the danger of convicting on the uncorroborated testimony, whether unsworn or sworn, of a complainant in the class of case under review, or of an accomplice, was present in the judge's mind but that nevertheless he believed the evidence and convicted.

If that is lacking, as in the present case, I am of opinion that it is the duty of an Appellate Court to quash the conviction and not to assume that which is not before it.

If, on the other hand, it appears in any case clearly from the record that the judge has had these considerations in mind, I take the view that an appellate Court will not interfere with the conviction merely on the ground of the want of corroboration.

A similar view was taken by Woodward, Ag. C. J. and Whitley, J., in the case of *The King* v. *Lim Yam Hong* reported in 14 S.S.L.R. p. 152. This was an appeal to the Supreme Court against a conviction by the District Judge under Section 411 of the Penal Code on a charge of retaining stolen property, in which the question of accomplice evidence and corroboration is dealt with at some length.

Acccordingly I am of opinion that this appeal should be allowed and that the conviction should be quashed.

Appeal allowed. Conviction quashed.

Solicitors the Appellant—*Pillai & Co.*,